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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 775

HARRY BROWN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, First Judicial Department, which affirmed the Judgment of Conviction of the Supreme Court of the State of New York, Bronx County. Leave to appeal to the Court of Appeals of the State of New York, made to a Judge thereof was denied.

Opinions Below

The opinion of the Supreme Court of the State of New York, Bronx County, Trial Term Part XVII, by Mr. Justice McCaffrey, the trial Justice, is the only opinion in the case. It is not otherwise reported, and appears in the certified record (RR 65-70) and is reproduced in the appendix. The Appellate Division of the First Department, New York Supreme Court affirmed without opinion April 2, 1968 (29 A. D. 2d 1049) (R 84), and leave to appeal to the Court of Appeals was denied September 4, 1968 (R 85 & R 89).

Jurisdiction

Judgment of conviction was affirmed by the Appellate Division April 2, 1968, leave to appeal to the Court of Appeals of the State of New York was timely made, and the application was denied on July 8, 1968 (R 85). An application to reargue was timely made July 31, 1968 (RR 86-88) and denied on September 4, 1968 (R 89).

The jurisdiction of this Court is invoked pursuant to the authority of 28 U. S. C. 1257(3).

Questions Presented

Does the exemption of peace officers from the provisions of a penal law which makes it a felony to carry a handgun apply to a peace officer who after being suspended is, at his request, placed on leave without pay, when such peace officer was never removed from his position by required

disciplinary proceedings? Does his conviction of the felony on the basis that he did not retain his exemption, deprive him of equal protection of the laws and due process of law?

Constitutional and Statutory Provisions Involved

The pertinent provisions are set forth in the appendix:

United States Constitution, Amendment XIV, §1.
Civil Service Law, Section 75(1a, 1b) (*McKinney's Consol. Laws,* Book 9, p. 200 [1959]).
Penal Law §1897(2) (*McKinney's Consolidated Laws,* Book 39, p. 613 [1967]).
Penal Law §1900(a-1-a) (*McKinney's Consolidated Laws,* Book 39, p. 613 [1967]).
Code of Criminal Procedure, §154 (*McKinney's Consolidated Laws,* Book 66, Part I, p. 325 [1958]).

Statement of the Case

The Petitioner was indicted for violation of Section 1897(2) of the *Penal Law* which makes it a felony to carry a loaded firearm and for two other charges which were not brought to trial and which are not herein involved (RR 1-3). The Court in its opinion found that the Petitioner was a uniformed court officer of the Criminal Court of the City of New York who had been suspended and thereafter at his request placed on leave of absence without pay and was granted an indefinite leave of absence without pay, and held that status when he was apprehended with a loaded firearm (R 67). The Court thereupon recognized that Section 1900 of the *Penal Law* exempts "peace officers as defined in Section 154 of the *Code of Criminal*

Procedure" from Section 1897 of the *Penal Law* (R 68). Section 154 of the *Code of Criminal Procedure* was recognized by the Trial Justice as including a uniformed court officer of the Criminal Court of the City of New York within the definition of peace officer. The Court concluded that the Petitioner did not retain the exemption and found him guilty (R 69) and he was given a suspended sentence (R 73). The determination was made despite the Petitioner's insistence that he still retained his exemption (R 59). People's Exhibit 4 in evidence Petitioner's employment record (R 75), which was before the Trial Justice, indicates that the Petitioner is a veteran. The Petitioner excepted to the finding of guilt (R 69). Said record of employment does not indicate any disciplinary hearing on stated charges or disciplinary dismissal arising from any hearing. The only issue is whether the Petitioner retained his exemption and was deprived of equal protection of the laws and due process of law by his conviction. An appeal as of right to the Appellate Division of the Supreme Court from each and every part of the judgment of conviction was timely made (R 83) and judgment was affirmed without opinion (R 84). Leave to appeal to the Court of Appeals was denied (R 85) and reargument of the application was denied (R 89).

Federal Question to Be Reviewed

The question of whether the Petitioner was denied equal protection of the laws and due process of law arose when Petitioner moved to dismiss the case at the end of the People's case by claiming that he enjoyed the exemption of Section 1900 of the *Penal Law;* decision was reserved (R 60). Petitioner rested on the entire case (R 62). The Court thereafter rendered its decision concluding that the Petitioner did not have the exemption, which determination was duly excepted to by the Petitioner (R 69). Thereafter, in the application to Judge Breitel of the Court of Appeals to reargue the issue of leave to appeal, it was contended that the only way the Petitioner, a veteran, could be removed from his position was after a hearing on stated charges with a right to counsel, as is required by Section 75 of the *Civil Service Law* (R 87) and that "By his exclusion from that group in a manner other than that procedure required to remove him, he was thereby denied equal protection of the Laws under the United States Constitution" (R 87). The argument was rejected (R 89).

Reasons for Granting the Writ

The Fourteenth Amendment to the *United States Constitution* requires that all persons of a given class be treated equally by the states and the uniform application of the Penal Statutes of the states is of paramount importance in achieving this end.

In this case the Trial Judge recognized "the unique facts of this case" (R 68). It should be noted that the leave of absence took place June 19, 1964 (R 76) and that the

Petitioner was still carried as an employee, receiving a salary increase to $7,693.00 on July 1, 1964 (R 75). He was a veteran (R 75) and as such could only be dismissed after a hearing on stated charges with a right to counsel under the provisions of Section 75, *Civil Service Law*. Unless such dismissal so founded took place, the Petitioner remained a Uniformed Court Officer. The Trial Justice, in excluding this Petitioner from the exemption of *Penal Law* §1900, in effect removed Petitioner from his position without such a disciplinary hearing held by his supervisors. The Trial Court added limits to the definition of "peace officer" which do not appear in the wording of the statute. If the Legislature wished to limit the term "peace officer" it could have done so. The conviction of the Petitioner should not be the vehicle by which the penal statute is expanded beyond its terms or modified. The Petitioner should not be required to bear this burden. The statutes are clear and unambiguous and do not require interpretation at the expense of this Petitioner.

Exemptions in penal statutes are to be construed liberally in favor of a person charged with a violation of the statute. *Schyler* v. *So. Pac. Co.*, 37 Utah 581, 109 P. 458; rehearing denied, 37 Utah 613, 109 P. 1025; aff'd 227 U. S. 601; *State* v. *Hill*, 189 Kan. 403, 369 P. 2d 365.

Section 1900 of the *New York Penal Law* is in clear terms and did not need construction. The Petitioner was a peace officer and remained so in the absence of a disciplinary hearing to remove him as required to remove veterans under *Civil Service Law* §75. Had the Legislature desired to limit "peace officer" to those on actual duty, it would have done so. Many state legislatures have similar exemptions to the weapons felonies in their statutes and

do limit the term peace officer to those on actual engagement of duty. Some of these states are: Arkansas: *Ark. Stat.,* Title 41, §41-4501; California: *Penal Code,* §12027; Arizona: *Revised Statutes,* §13-911. New York is not unique in failing to limit the term "peace officer" as do the foregoing states. Some other states which do not limit the term in their exemption provisions to the weapons felony are: Delaware: *Code,* Title 11, §461(g); Florida: *Fla. Stat. Ann.,* §790.01; Illinois: *Ill. Ann. Stat.,* Ch. 38, §24-2 (a)(1); Michigan: *Title 28,* §28:428.

It is therefore quite apparent that the legislative intent was not overlooked in the wording of the statute. It is further apparent that the widespread usage of the exemption by various states makes this case one of national significance. A clear definition of equal protection of the laws in the circumstances of the case at bar would have nationwide application in serving as a precedent to courts faced with clearly worded statutes who feel a need to add to or detract from the statute's plain meaning.

CONCLUSION

The Petitioner, having exhausted his state remedy, has been denied equal protection of the laws and due process of law; the circumstances thereof are of national significance and the requested Writ of Certiorari should be granted.

Respectfully submitted,

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